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FEDERAL COMMUNICATIONS COMMISSION
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage	))))))))	MM Docket No. 92-265

Comments of Turner Broadcasting System, Inc.

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SUMMARY

Turner Broadcasting System, Inc. ("TBS") supports the comments submitted today by the National Cable Television Association. It also submits separate comments on specific issues in order to provide our unique perspective as a major programmer.

• The Commission has correctly concluded that the Act requires prospective application of whatever anti-discrimination rules the Commission adopts. From TBS's perspective, this may be the single most important component of the program access equation that the Commission must resolve. Any set of regulations that was not prospective could be potentially devastating to cable program networks, virtually impossible to administer, and would exacerbate the constitutional problems that already exist with respect to these rules.

• The Commission should also establish a presumption that exclusive contracts entered into for the purpose of launching a new program service are in the public interest. In so doing, the Commission should not limit exclusivity to two years. The circumstances surrounding TBS's launch of TNT, where exclusivity was used as a powerful tool to promote program diversity, support these conclusions.

• The Commission should permit programming vendors to establish justifiable price differentials among different delivery systems. From a programmer's perspective, there is no justification for selling its product to cable operators and some of the other delivery systems, such as satellite dish distributors, at the same price. The economic role the distributors play and the economic benefits the programmer receives are very different.

• The Commission should adopt a "safe harbor" presumption that volume discounts in a specified range are legitimate. Such a safe harbor would reflect the recognition that both

vertically integrated and non-integrated programmers have generally used such discounts and that volume discounts result in permitted economic benefits under the 1992 Act.

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Distribution and Carriage	)	

Comments of Turner Broadcasting System, Inc.

Turner Broadcasting System, Inc. ("TBS"), by its attorneys, hereby submits initial comments on the FCC's Notice of Proposed Rulemaking ("NPRM") concerning the adoption of program access rules to implement Sections 628 and 616 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act"). TBS is a diversified company which operates five national program networks, including the Cable News Network, Headline News, Turner Network Television, the Cartoon Network, and TBS SuperStation.

TBS joins in and supports the comments submitted today by the National Cable Television Association on the proposals set forth in the NPRM. We are submitting these separate comments on several specific issues raised in the NPRM in order to provide our unique perspective as a major programmer. TBS will be affected substantially by whatever program access rules are adopted as a result of this proceeding.[1]

I. The Commission Has Correctly Concluded that the Anti-Discrimination Rules the Commission Adopts Should Apply Prospectively to Only New Transactions

As an initial matter, TBS fully agrees with the Commission's tentative conclusion that any pricing policies or restrictions the Commission develops to implement the anti-discrimination rules mandated by Section 628 should be applied prospectively to only new transactions so as not to affect contracts existing at the effective date of these rules. NPRM at ¶ 27. In fact, from our perspective, this may be the single most important component of the program access equation the Commission must resolve. Any set of regulations that did not contain this element of prospectivity would be devastating to cable program networks, virtually impossible for the Commission to administer, and would exacerbate the constitutional problems that already exist with respect to these rules.

Testing existing contracts under the standards developed for Section 628 would be a chaotic nightmare for all concerned, and requiring the alteration of existing business deals would wreak economic havoc in the industry. Existing program contracts came about after hard bargaining and negotiations by both sides. Both sides sought the best deal and terms

[1] Litigation is currently pending in the United States District Court for the District of Columbia challenging the constitutionality of the program access provisions of the 1992 Act. See Time Warner Entertainment Company, L.P. v. Federal Communications Commission, Civ. Act. Nos. 92-2494, et al. (D.D.C.). In submitting these comments, TBS reserves expressly and does not waive its constitutional rights on these issues. Since we recognize that the Commission must move forward to implement the 1992 Act, we offer these comments to assist in that implementation.

possible, and, at the time of the negotiations, different customers often would have different priorities which led to variances among the contracts we have with our customers. To attempt to resurrect the circumstances surrounding the negotiations to explain or justify all variances would be close to impossible. To immediately throw open all program networks' carriage contracts would cloud the major assets of a program network. And, therefore, for the Commission to embark down such a path would be a clear error of law. See National Ass'n of Independent Television Producers and Distributors v. FCC, 502 F.2d 249 (2d Cir. 1974).

Fundamental principles of statutory interpretation further support the Commission's conclusion on the prospective application of these provisions. The Supreme Court has instructed that the retroactive application of federal statutes is strongly disfavored absent a clear directive to that effect from Congress:

> Retroactivity is not favored in the law...Thus congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result...By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.

Bowen v. Georgetown University Hosp., 488 U.S. 204, 208 (1988) (citations omitted).[2/] Where, as here, the 1992 Act is silent and therefore neither expressly directs the retroactive application of these provisions nor indicates that the FCC could adopt rules with such an

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[2/] See also Leland v. Federal Insurance Administration, 934 F.2d 524 (4th Cir.), cert. denied, 112 S. Ct. 417 (1991) (refusing to give National Flood Insurance Act amendments retroactive effect); Criger v. Becton, 902 F.2d 1348 (8th Cir. 1990) (same).

effect, the provisions should be prospectively applied.[3] This lack of any expression of clear congressional supports the prospective application of these provisions and any rules promulgated thereunder. See Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 837 (1990) (requiring "clear congressional intent" to justify retroactive application of statute).

The 1992 Act does not represent the typical case in which retroactive legislation can be upheld as a means of ensuring that the costs of a program or activity are borne by the entire class of persons that Congress believes should bear them.[4] To the contrary, application to existing contracts would not spread the "costs" fairly, but would place an undue burden on and create a logistical nightmare for a targeted class of programmers, and would upset bargained for benefits and the reliance interests of the contracting parties.

Finally, the antitrust case law in the Robinson-Patman enforcement area also supports the conclusion that the rules should only apply to new transactions.[5] For example, no Robinson-Patman Act price discrimination between two purchasers can occur unless the sales are reasonably contemporaneous. See, e.g., Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676 (10th Cir.), cert. denied, 469 U.S. 854 (1984); Atalanta Trading Corp. v. FTC,

[3] See NPRM at ¶ 27 (noting that the 1992 Act is silent concerning enforcement of anti-discrimination rules with respect to existing contracts).

[4] See, e.g., U.S. v. Sperry Corp., 493 U.S. 52 (1989); see also National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co., 470 U.S. 451 (1985); Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

[5] As we indicate infra, it is the language of Section 628 that establishes the standards the Commission is to apply. We do agree that those standards are most akin to antitrust concepts. Although there are important differences, certain aspects of Robinson-Patman case law may provide the Commission assistance in applying the standards in Section 628.

258 F.2d 365 (2d Cir. 1958); Dealers Wholesale Supply v. Pacific Steel & Supply, 1984-2 Trade Cas. ¶ 66,109 (N.D. Cal. 1984); Grandstaff v. Mobil Oil Corp., 1979-1 Trade Cas. ¶ 62,421 (E.D. Va. 1978). And the price in a long-term contract is only contemporaneous with a sale made at approximately the same time. See, e.g., Texas Gulf Sulphur Co. v. J.R. Simplot Co., 418 F.2d 793 (9th Cir. 1969). It would thus be improper under Robinson-Patman jurisprudence to compare current (or future) pricing or terms to pricing under already-existing contracts.

In sum, the FCC has correctly recognized that any rules implementing the 1992 Act's anti-discrimination provisions must be prospectively applied. This interpretation of the anti-discrimination provisions of Section 628 not only comports with general principles of statutory construction and due process concerns, but also recognizes the very substantial practical problems that impairment of existing contracts would cause for both the programmers and their affiliates. Governmental abrogation of privately negotiated contracts is a drastic action which should be exercised only when essential to achieve public policy goals -- that is not the case here. Consequently, TBS strongly believes that the Commission must adhere to its tentative conclusion, i.e., -- to adopt rules that apply once existing contracts have expired.

II. The Commission Should Establish a Presumption that Exclusive Contracts Entered Into For the Purpose of Launching a New Program Service are In the Public Interest

Section 628(c)(2)(D) instructs the FCC to issue regulations that prohibit a vertically integrated programmer from entering into an exclusive agreement with a cable operator as to areas served by cable, unless the FCC finds that the agreement is in the public interest. In the NPRM, the Commission proposes establishing a rule presuming, at the outset, that exclusive distribution contracts for new program services are in the public interest. NPRM at ¶ 36. TBS, which has exclusive contracts for TNT, one of its five national program services,[6/] fully supports this proposal.

As the Commission correctly recognizes in the NPRM, exclusive distribution rights are essential to the launch of new services and to the goal of achieving program diversity. Id.[7/] The role of exclusive arrangements in encouraging and promoting new services and in enhancing diversity, has been recognized by the Commission[8/], the courts[9/], and by Congress in enacting this Act.[10/]

[6/]Similarly, TBS is partial owner of, and operator of, Sports South, a regional sports network. Launched when channel capacity was tightening, exclusivity was used as an effective marketing lever, as it was for TNT.

[7/]See also United Video, Inc. v. FCC, 890 F.2d 1173, 1181 (D.C. Cir. 1989) (prohibiting exclusive agreements results in a reduction of diversity).

[8/]See, e.g., Syndicated Exclusivity, 3 FCC Rcd 5299, 5309 (1988) (noting that the lack of syndicated exclusivity reduced programming supply).

[9/]See, e.g., Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 55-56 (1977), on remand, 461 F. Supp. 1046 (N.D. Cal. 1978), aff'd, 694 F.2d 1132 (9th Cir. 1982) (a principal benefit of exclusivity is that it induces the distributor to promote fully the programming to which it has exclusive rights, chiefly by preventing its potential distribution rivals from "free-riding" on its promotional efforts); United Video, 890 F.2d at 1179-80, see also U.S. Department of Commerce, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233, at 109-10 (1988) ("Both buyer and seller can benefit from the availability and enforceability of exclusive rights").

[10/]See, e.g., Section 628(c)(4)(C), (D) (directing the FCC to consider, inter alia, the effects of an exclusive contract on the attraction of capital investment in the production and distribution of new programming and on diversity of programming in the multichannel video programming distribution market); see also Statement of Rep. Manton, Cong. Rep. at H

(continued...)

The circumstances surrounding TBS's experience with exclusive contracts is instructive. Turner Network Television ("TNT") was launched as a cable-exclusive network in October 1988. Exclusivity was a powerful tool to make the launch of TNT financially feasible.

Launching a new cable network is a risky venture. TNT was no exception. The idea of creating TNT was publicly greeted with extreme skepticism (see articles attached hereto). In order to gain three-year commitments from cable operators to carry and pay for TNT, TBS offered exclusive distribution rights to systems who signed during the launch phase and MSOs who signed up at least 75% of their subscribers during TNT's launch phase. Exclusivity was not (and is not now) available to operators who signed up post-launch. TNT is a clear case of exclusivity being effectively used to promote program diversity.

The FCC should not, however, limit the permissible duration of such contracts to two years. See NPRM at ¶ 36. A contract of such a short duration would provide the distributor with little incentive to undertake the risks inherent in launching new programming and to aggressively promote and market the product since other distributors would soon have the opportunity to "free-ride" off of whatever efforts the distributor may have made. It would be akin to limiting patent protection to only two years. Rather, the Commission should adopt a presumption that such contracts are in the public interest regardless of duration, unless the complainant can demonstrate that they are not, based on the factors set forth in the statute.

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[10](...continued)
6535 (July 23, 1992) (exclusive rights give programmers and cable operators an incentive to invest in new and improved programming, thereby increasing the quality [and] diversity of programming available to consumers).

The TNT experience is again instructive. Exclusivity was the incentive that induced cable operators to commit to the unproven service. To cable operators, the opportunity to have exclusive rights to programming, if it turned out to be successful, as against possible future competitors such as telephone companies, made the risk worthwhile. The exclusivity is permanent, so long as they remain customers. As one would expect, there are penalty provisions if exclusivity is eliminated. TNT probably could not have happened if exclusivity was not available to be used or was limited to two years.

Exclusivity thus was not a one-way bargain "extracted" by the cable operator from a programmer, but a calculated business decision by TBS to help launch a new venture. Furthermore, TBS made sure its business interests were protected to the maximum extent possible. TBS requires cable operators to distribute TNT to home satellite dishes and SMATV. TBS reserves the right to sell directly to hotels and other commercial establishments. Exclusivity was not offered in markets where two cable operators already operated. TBS has sold TNT to TVRO owners in nonexclusive geographic areas from the beginning, and the NRTC, along with HBO and Superstar Connection, will begin selling TNT in nonexclusive geographic areas on February 1, 1993. For TBS and TNT, exclusivity was the right strategic tool at the right time.

III. The Commission Should Permit Programming Vendors to Establish Justifiable Price Differentials Among Different Delivery Systems

Section 628(c)(2)(B) of the 1992 Act requires the FCC to adopt regulations that prohibit "discrimination" by a vertically integrated cable programmer in the "prices, terms and conditions of sale or delivery" of cable programming "among or between cable systems, cable operators, or other multichannel video programming distributors..." With respect to this provision, the Commission seeks comment, inter alia, on the standard it should apply to determine if a price differential is legitimate. NPRM at ¶¶ 20 - 25. The Commission further requests any system of presumptions it could incorporate with this approach. NPRM at ¶ 16.

We believe that the language of Section 628 itself establishes the standard for the Commission to apply. Moreover, that language does not require uniform pricing to all customers (or even that a programmer deal with all potential customers). Under Section 628, reasonable price differentials among different delivery systems should be presumed to be justifiable unless the complainant is able to demonstrate that the differential results in "harm", by "significantly hinder[ing] or prevent[ing] the multichannel video programming distributor from providing satellite cable programming...to subscribers or consumers." Section 628(b).[11/]

Section 628 supports the incorporation of such a presumption, since the plain language of the Act permits programmers to fairly differentiate prices, terms and conditions among distributors based on the costs of creation, sale, delivery, or transmission of

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[11/] TBS agrees with the Commission that its regulations should only proscribe practices that are both "unfair", "deceptive," or "discriminatory" and significantly hinder multichannel video programming distributors from providing satellite cable programming to consumers. NPRM at ¶ 10.

programming[12/] **as well as** on the basis of economies of scale, cost savings, or other "direct and legitimate benefits reasonably attributable to the number of subscribers served by the distributor."[13/] These statutory formulations should permit programmers to establish prices which may differ between different types of distribution technology. **In other words, Section 628 contemplates -- and certainly permits -- program networks to have different prices for different delivery systems.**

Cable program networks set prices in negotiation with potential delivery systems: the programmer wants as substantial a return as can be achieved while leaving the distributor a good business and strong incentives to perform -- this is not uncommon to any product distribution. At the same time, the consumer wants a high quality product.

For example, from a programmer's perspective, there is no justification for selling its product to a cable operator and a satellite dish distributor at the same price. The economic role the distributors play and the economic benefits the programmer receives are very different. In many cases distributors do help sell programming. However, in the final analysis, dish distributors are solely middlemen, and they do not add to the potential

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[12/]Section 628(c)(2)(B)(ii). See also Sen. Report 102-92 at 28 ("The Committee recognizes that distributors may undertake different levels of promotion, marketing, billing, and collection, and other efforts that are of value to video programmers, and that there are legitimate business considerations in establishing rates, terms, and conditions with multichannel video distributors. The Committee intends that video programmers have flexibility in negotiating price, terms, and conditions for distribution, so long as the price, terms, and conditions allow competition to flourish"). The colloquy between Sens. Inouye and Kerrey, moreover, suggests that Congress intended these provisions to also permit program vendors to consider the costs of sale, delivery and transmission at the distributor level in setting their prices, terms and conditions. See Congressional Record, October 5, 1992 at S 16671.

[13/]Section 628(c)(2)(B)(iii).

customer base, since TBS's own dish distribution business potentially reaches all TVRO homes. They do not build physical plants to push penetration rates, they do not help create a mass audience which advances programmers' advertising objectives, nor do they commit resources to market cable networks like cable systems do. The administrative costs of providing service to a cable operator are far lower than to a dish distributor; signal theft is also much greater in the dish business, and the cost of maintaining is also exponentially greater.

Fundamentally, mass penetration is the lifeblood of cable programmers. Cable systems, due to their massive investment in infrastructure, must gain wide penetration to have a successful business. In fact, cable penetration nationwide is now 65% of all television homes. A satellite dish distributor, like NRTC, which provides TBS with 62,000 CNN customers nationwide out of 92 million television homes, is not nearly as critical to a programmer's success as a cable operator which provides us with 62,000 customers in a city which has 90,000 total television homes, because that cable operator, taken together with others, provides TBS with a subscriber and advertising base to support our programming costs while the dish dealer does not.

Similarly, SMATV and MMDS present a different business opportunity for a cable program network than do cable operators. The number of subscribers in a typical MMDS or SMATV system is far lower than that which cable systems typically provide; administrative costs per subscribers for these systems, therefore, are higher than for cable. Penetration rates for these technologies are far lower than for cable. MMDS technology is not as secure from signal theft as cable. MMDS also has lower channel capacity, is subject to terrestrial interference and is technically inferior to cable in picture quality and reliability -- all of major importance to cable programmers.

Thus, it would be inappropriate to create a presumption that pricing for all technologies should be identical. To the contrary, the presumption should exist that reasonable price differentials are proper, absent direct evidence that they have been established to hinder significantly or to prevent a distributor from providing programming to subscribers or consumers.

IV. The Commission Should Adopt a "Safe Harbor" Presumption for Volume Discounts

As noted above, Section 628(c)(2)(B) includes an express mandate that any regulations adopted by the Commission shall not prohibit vertically integrated programmers from establishing different prices which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor..." Section 628(c)(2)(B)(iii). Volume discounts exist for virtually every product or service in the American economy. They are especially justifiable for services such as a cable program network, which desires mass penetration upon which to capture advertising revenue.

As a consequence, the Commission should establish a presumption that volume discounts in a certain range are legitimate, unless a complainant to the Commission can demonstrate that the programmer's use of discounts was otherwise "discriminatory" and resulted in the competitive "harm" contemplated by the section 628(b) of the 1992 Act.[14] We would propose that a "safe harbor" with an upper limit of not less than 20% would be appropriate. This is the upper limit of our volume discounts. Such a safe harbor would recognize the legitimacy of the practice of using volume discounts in this range, reflect the recognition that both vertically integrated and non-integrated programmers have used such discounts within this range historically, as well as the fact that the use of such discounts results in permitted economic benefits under the 1992 Act.[15]

These economic benefits accrue particularly to program networks like those operated by TBS and "non-integrated" networks such as ESPN and USA which derive revenues both from subscriber fees and from advertisements carried during the course of the network's programming. Reducing prices to maximize penetration results in economic benefits for these networks because their advertising revenue is dependent upon the number of viewers the network actually reaches and expects to reach by virtue of its affiliation with the distributor. Such reductions, moreover, allow the network to obtain with a single customer maximum subscriber penetration and the "direct and legitimate" economic benefits authorized by Congress.

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[14] By proposing a safe harbor for volume discounts, we are not suggesting that Section 628 cannot accommodate other types of discounts such as introductory, marketing support, etc.

[15] Such a presumption, moreover, is supported by the legislative history. As noted in the Conference Report, the original language in the House bill expressly permitted programmers to establish different price, terms and conditions to take into account "reasonable volume discounts based on the number of subscribers served by the distributor" (emphasis supplied). As finally, adopted, the bill covers a broader scope, thus allowing programmers to take into account factors beyond volume discounts. Report, 102-862, 102d Cong., 2d Sess. at 92-93.

In the final analysis, volume discounts are a tool used by business to create distribution and success. It may not be the tool of choice in all circumstances, but it should be available. For example, for TNT, where we offered exclusive contracts, we have not offered volume discounts, at launch or any time thereafter.

As the Commission is well aware, broadcast networks do not pay the same affiliate compensation fees to each of their affiliate stations. Each broadcast market is different, the parties may bring different negotiation goals (or skills) to the table for different markets, and competition may require different results. The same factors apply here, and the Commission should recognize that reality by adopting a safe harbor for volume discounts. Doing so would be akin to the safe harbor established in the antitrust merger guidelines, providing the benefits of certainty and predictability.

V. Other Matters

A. The Attribution Rules Adopted For Cable Programmers for Purposes of These Rules Should At Least be Comparable to Those Applied To the Programmers' Broadcast Counterparts

The Notice requests comment on whether in determining whether a firm is vertically integrated for purposes of Section 628, the Commission should define a cable operator's "attributable interest" in a programmer with reference to the attribution standards generally applicable to the broadcasting industry. NPRM at ¶ 9. TBS firmly believes that whatever standard is chosen should be comparable to the standard applied to TBS' broadcast counterparts.[16] These rules will be sufficiently onerous without further tilting the competitive playing field.[17]

Additionally, the attribution rule adopted by the Commission should, consistent with the broadcast rules, exempt from attribution the voting stock interests of minority shareholders where there is a single majority shareholder.[18] This exemption should apply in this context since the single majority shareholder both controls the corporation for ownership purposes and places a check on the ability of the other individuals or entities holding a minority interest to influence the conduct of the corporation with respect to unaffiliated distributors and programmers. To the extent influence is exercised by minority shareholders, it would likely be reflected through attribution of their positional interests in the company.[19]

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[16] See, e.g., 47 C.F.R. § 73.3555(d) (limiting the number and audience reach of television stations in which an entity -- including a broadcast network -- may hold an attributable interest). The cable programmer attribution rules should be no stricter than the broadcast attribution rules if those rules are relaxed as proposed. See Notice of Proposed Rulemaking in MM Docket No. 92-51, 7 FCC Rcd 2654 (1992).

[17] TBS supports the argument made by some that a programmer should not be considered to be vertically integrated where the size of the MSO with which it is vertically integrated is small or where their holdings are so limited as to be deemed de minimis.

[18] See 47 C.F.R. § 73.3555 Note 2(b). The "single majority shareholder" exception applies to corporations in which a single person owns more than 50% of the voting stock of the corporation.

[19] Applying this exception, TBS' cable operator ownership interests would be non-cognizable, while the operators' positions on TBS' board would be cognizable. See 47 C.F.R. § 73.3555, Note 2(h) (attribution for officers and directors).

B. Legitimate Business Practices Engaged in By Both Vertically Integrated and Non-Integrated Firms Should Be Deemed Per Se Legal

The Commission requests comment on whether Section 628 is intended to require vertically integrated firms to conduct themselves in a manner similar to non-integrated firms or whether the regulations should cause vertically integrated firms to function differently than non-integrated firms. NPRM at ¶ 8. TBS believes that such behavioral rules are both unwarranted under the Act and would countermand the Act's policy of "rely[ing] on the marketplace, to the maximum extent feasible." 1992 Act, Section 2(b)(2). To satisfy constitutional requirements and as a matter of competitive fairness, the Commission should presume that a business practice is legitimate for an integrated programmer if a non-integrated programmer engages in a comparable practice, such as the practice of offering "reasonable" volume discounts. Put simply, if a non-integrated network may legally engage in a practice, it cannot be an "unfair method of competition" or an "unfair or deceptive act or practice" for an integrated network to also do so.

C. Antitrust Jurisprudence May Provide Some Guidance to the Commission

Section 628 itself provides the governing standard for the Commission to apply. Having said that, TBS does believe that among the options the Commission identifies in the NPRM, the Commission can find some support and guidance by reference to antitrust principles, including case law under the Robinson-Patman Act. However, as the questions included in the NPRM (¶ 22) presuppose, the Commission must recognize differences between the generally-applicable Robinson-Patman Act and the more narrowly focused provisions here, and not merely transfer such jurisprudence wholesale to Section 628. For instance, the Robinson-Patman Act includes a "meeting competition" defense not explicitly provided for in the 1992 Act. Moreover, while the Robinson-Patman Act contains a rigorous cost justification defense, Congress, in recognition of the particular marketplace in which cable program networks operate, directed the Commission to consider a broader range of cost and economic factors than might be considered under Robinson-Patman in assessing whether differentials in prices, terms and conditions are justifiable. The application of Section 628 developed by the Commission should preserve these differences.

D. Harm Should be Evaluated in the First Instance in Local Markets

In ¶ 11 of the NPRM, the Commission poses the question of what geographic market should be relevant to determine whether a proscribed behavior causes anticompetitive harm. The answer is that Section 628 exists in the first instance to prevent harm between competitors in a definable local market, and where a local market exists, no violation should be found or relief accorded unless harm in such a market is proven.

Such a conclusion is consistent with the overall antitrust approach we think appropriate under the statute. We agree with the Commission's recognition (NPRM ¶ 22 n.45), that the secondary line Robinson-Patman discrimination cases can provide some guidance in this area. The case law regarding secondary line injury requires proof of competition between the favored and disfavored purchaser. See, e.g. National Distillers & Chem. Corp. v. Brad's Machine Products, Inc., 666 F.2d 492 (11th Cir. 1982); Lupia v. Stella D'Oro Biscuit Company, 586 F.2d 1163 (7th Cir. 1978); Parrish v. Cox, 586 F.2d 9 (6th Cir. 1978). There cannot be competitive injury when the favored and disfavored purchasers operate in different geographic markets. See, e.g., Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 585-86 (2d Cir. 19787) (purchasers operated in different exclusive territories). We believe the same result is called for in these circumstances where a local market exists.

To be sure, there may be areas, such as rural areas, where a traditional geographic market does not exist. In order to fulfill Congress' mandate to extend programming to areas not served by cable,[20] the Commission will have to resolve whether pricing or terms for vendors serving such areas "hinder significantly" the providing of programming to consumers in those areas.

E. In Determining "Harm," the Commission Should Consider The Extent to Which the Challenged Practice Restrained the Distributor From Providing Programming to Subscribers Or Consumers

The NPRM seeks comment on the evidence that a distributor should be required to provide in order to show that a particular unjustified price differential causes the type of competitive harm contemplated by the Act. NPRM at ¶ 10 n.26. The plain language of the Act requires the Commission to prohibit only those practices that are both "unfair,", "deceptive", or "discriminatory", the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming...to subscribers or consumers" Section 628 (b) (emphasis supplied).

[20] Report 102-862 at 93.

In assessing "harm" under this standard, the plain language of the statute requires the focus of inquiry to be on whether the distributor was prevented or significantly hindered from providing programming to consumers, not on whether the distributor was prevented or hindered significantly from reaping a large profit margin when it provided such programming. Consequently, to demonstrate harm, the distributor should be required to show that the terms imposed by the programmer are not only "discriminatory", using an antitrust standard, but also resulted in retail prices too high to attract consumers, thereby effectively preventing the distributor from providing the programming to consumers.

CONCLUSION

As the NPRM acknowledges (¶ 5), Congress recognized that vertical integration in the cable industry has provided public benefits and contributed to enhancing development of innovative programming ventures. TBS can attest to the accuracy of that recognition. TBS urges the Commission to read carefully and consistent with the 1992 Act which will ensure that programmers have the flexibility to respond to consumer demand through the creation of a wide diversity of new program services and that distributors will be willing to undertake the risks associated with distributing a fledgling service.

Respectfully submitted,

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